

1990

# State of Utah v. Haven Whitear : Brief in Opposition to Certiorari

Utah Supreme Court

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BRIEF

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IN THE UTAH SUPREME COURT

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STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	
	)	App. Court No. 890301-CA
vs.	)	
	)	
HAVEN WHITEAR,	)	900165
	)	
Defendant/Appellant.	)	

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Response to Appellant's Petition for Writ of Certiorari to  
Review Court of Appeal's Order of Affirmance of Conviction for  
Intoxication Rendered by the Honorable Roger S. Dutson in the  
Second Circuit Court, Morgan Department, State of Utah

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**FILED**

MAY 14 1990

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Clerk, Supreme Court, Utah

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IN THE UTAH SUPREME COURT

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STATE OF UTAH,	)	
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Plaintiff/Respondent,	)	
	)	App. Court No. 890301-CA
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	)	
HAVEN WHITEAR,	)	
	)	
Defendant/Petitioner.	)	

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

With regard to the questions identified by Petitioner, Respondent points out that Petitioner has simply restated the issues presented in his original appeal.

ORDER OF THE COURT OF APPEALS

The Court of Appeals issued an Order of Affirmance stating, "Defendant's conviction of public intoxication is hereby affirmed." A copy of the Order is included in the Appendix to this brief.

JURISDICTION OF SUPREME COURT

Respondent accepts Petitioner's statement of jurisdiction.

### CONTROLLING PROVISIONS OF LAW

1. 76-9-701. Intoxication.

(1) A person is guilty of intoxication if he is under the influence of intoxicating liquor, a controlled substance, or any substance having the property of releasing toxic vapors, to a degree that the person may endanger himself or another, in a public place or in a private place where he unreasonably disturbs other persons.

2. Rule 46. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

### STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings, and Disposition in Lower Courts.

Petitioner was arrested the night of November 18, 1988, at the Stoddard Inn in Morgan County and was charged with

Intoxication and Disorderly Conduct, both class C misdemeanors. On March 8, 1989, petitioner had a bench trial before the Honorable Roger S. Dutson, Second Circuit Court Judge. Defendant was convicted of Intoxication and acquitted on the charge of Disorderly Conduct. Contrary to petitioner's statements both in his Statement of the Case herein and in his appellate brief in the Court of Appeals, the trial judge did not rule, find or otherwise state that verbal conduct could not form the basis for a conviction for disorderly conduct, but found insufficient evidence to convict petitioner of disorderly conduct. (R. 102-103). Petitioner was sentenced on April 12, 1989, to pay a fine of \$50.00. Following petitioner's appeal, the Court of Appeals, sua sponte, considered the appeal on an expedited basis under then Rule 31(a) of the Rules of the Utah Court of Appeals. Oral arguments were heard February 28, 1990, and an Order of Affirmance, without written opinion, was filed March 1, 1990. Petitioner's Writ of Certiorari was lodged April 1, 1990 and filed April 9, 1990.

B. Statement of Facts.

Petitioner's Statement of Facts omits facts that demonstrate petitioner's level of intoxication and basis for his arrest. Respondent therefore sets forth the following fact statement:

1. At about 9:30 or 10:00 P.M. on November 18, 1988, petitioner Whitear arrived at the Stoddard Inn in Morgan County and began drinking beer. Whitear drank at least two beers with



the bartender and a friend. (R. 43-44; 59-60). The bartender could not estimate how much Whitear had to drink while he was there. (R. 44).

2. At approximately 11:30 P.M., a neighbor living near the Stoddard Inn was awakened by three to four gunshots. (R. 83-85). She heard loud cursing and yelling, and observed a group of people in the parking lot of the Inn. She or her husband called the Morgan County Sheriff and reported shots and commotion at the Inn. (R. 85-86).

3. Deputy James Snyder was dispatched to the Inn at 11:50 P.M. (R. 35-36). While he waited for the sheriff and another deputy to arrive, Deputy Snyder observed an individual named Lynn Martineau crawling around in the snow and other people moving in and out of the bar. (R. 36).

4. When Sheriff Bert Holbrook arrived, he spoke with three individuals standing outside the Inn, including Lynn and Thales Martineau and petitioner Whitear. (R. 49). Lynn Martineau was highly intoxicated and shouting profanities. Sheriff Holbrook spoke to Lynn and Thales and received no response. (R. 49-50). He then asked Whitear, who was standing somewhat apart, what was happening, where the gun was, and if shots had been fired. Whitear told the sheriff nothing had happened and not to worry about it. (R. 49-50). Neither Sheriff Holbrook nor Deputy Snyder were able to obtain any information from the three about the shots that had been fired or the location of the weapon or weapons involved. (R. 40-41; R. 50; R. 55).

5. Sheriff Holbrook asked the three to step inside the bar and walked with Whitear to the door. The sheriff could smell alcohol on Whitear's breath, had to hold him by the arm at one point because he was swaying, and concluded that Whitear was intoxicated. (R. 50-51). Whitear attempted to argue with the sheriff at the door, but the sheriff requested that he go inside and be quiet while the officers were getting the matter resolved. (R. 51).

6. While at the door, Sheriff Holbrook observed that the bar was crowded and noisy, with approximately two dozen people inside the establishment. (R. 51). He did not have his night stick with him and asked Deputy Snyder to get the shotgun from his car. (R. 51-52). Sheriff Holbrook then entered the bar with the shotgun at port arms and yelled at the bartender twice to turn off the jukebox. (R. 52-54).

7. As the sheriff entered the bar, he was confronted by an individual named Jamie Colmer, who started giving him a bad time. (R. 53). At this point, Whitear, who was standing by the bar approximately 15 to 20 feet away, threw his arms in the air and hollered "Don't shoot." (R. 53, R.63). The sheriff observed people starting to become boisterous again, concluded that Whitear posed a danger because of his state of intoxication and the distraction he was causing, and asked Deputy Snyder to arrest him and remove him from the bar. (R. 53-56).

8. When Deputy Snyder reached Whitear after walking across the bar, Whitear still had his hands in the air. (R. 43-44). The

deputy placed Whitear in a rear arm bar, took him from the bar, and placed him in handcuffs. (R. 39). Deputy Jarvis Whitaker arrived at about this time and put Whitear in a sheriff's vehicle to keep warm. (R. 41-42).

9. While Whitear was being transported to the Morgan County Sheriff's office, he asked the sheriff if he could take an intoxilyzer test. Deputy Snyder set up the machine when they arrived at the office and asked Whitear to extinguish his cigarette so the test could be administered. Whitear refused to put out the cigarette and asserted that he would not take the test or answer any questions without counsel present. (R. 44-45). Sheriff Holbrook observed Whitear become belligerent and almost combative when questions were asked preparatory to administering the intoxilyzer test which Whitear himself had requested. (R. 58).

10. Deputies Snyder and Whitaker then transported Lynn Martineau and Whitear to the Weber County Jail in Ogden. (R. 42, R. 67). During the ride, Whitear asked Deputy Snyder the same questions over and over, such as where he lived and whether he was married. He also kept laughing at Martineau's drunken behavior in the car. Based on his observations, Deputy Snyder concluded Whitear was intoxicated prior to his arrest and posed a danger to the officers. (R. 42-44).

11. Deputy Whitaker was distracted by Martineau's behavior in the vehicle, but had occasion to observe Whitear's behavior after his arrest and later at the Weber County Jail. (R. 66-68).

Based on his observations, he concluded that Whitear was under the influence of alcohol. (R. 68).

12. Florence Peterson, an employee at the Weber County Jail who processed Whitear, testified that he was belligerent through the booking process. She reported that he did not want to answer questions, did not want to sign the booking sheet, and would not give an opinion about his physical condition. (R. 81). Based on her observations and nine years of experience dealing with intoxicated individuals at the jail, Ms. Peterson stated her opinion that Whitear was under the influence of alcohol to the extent that his behavior was affected. (R. 82).

#### ARGUMENT

A. There Are No "Special and Important Reasons" to Grant Certiorari in this Matter.

Rule 46 of the Utah Rules of Appellate Procedure provides that "Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons" [emphasis added]. Petitioner was convicted of Intoxication as a result of his drunken and potentially dangerous conduct in a tavern. This is not a matter involving suppression of petitioner's First Amendment rights and no special or important factors exist meriting review by this Court.

B. The Evidence Established Beyond a Reasonable Doubt that Whitear Was Intoxicated to the Extent that He Posed a Danger to Himself or Others.

There was substantial, credible evidence before the trial

judge that petitioner was intoxicated to the degree that he may have posed a threat to himself or others. His drunken behavior in a bar, in a situation where shots had been fired shortly before and law enforcement officers were attempting to locate a weapon and obtain information, clearly presented a danger to himself and everyone in the crowded premises. Petitioner's arrest was based on his conduct as a whole, not just the words he shouted. In talking with Whitear outside the bar, the sheriff had noted the odor of alcohol and Whitear's unsteadiness. When the sheriff entered the crowded bar, Whitear shouted "Don't shoot," while raising both arms above his head. Such words and actions could easily have caused alarm and panic, given the setting and the fact that shots had previously been fired in the immediate vicinity.

Given the facts, petitioner has no basis to claim that the trial court or the Court of Appeals acted in an unusual fashion that would justify granting of certiorari. The only reason which would merit review of the fact finding of the trial court, as upheld by the Court of Appeals, is found in Rule 46(c) of the Utah Rules of Appellate Procedure:

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision.

The clear weight of the evidence supports Whitear's conviction for intoxication. There is no indication of any departure from the "accepted and usual course of judicial proceedings."

C. Petitioner's Conviction Was Based on the Totality of His Conduct.

Petitioner attempts to show that his arrest and conviction for intoxication somehow violated his First Amendment rights of free speech. He apparently claims that the issue is "an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court." See Rule 46(d) of the Utah Rules of Appellate Procedure. Petitioner's argument is not tenable, however. As pointed out by this Court in Provo City Corporation v. Willden, 768 P.2d 455 (1989), when dealing with First Amendment challenges to state laws, federal courts have limited standing to "cases where a statute's deterrent effect on protected speech is real and substantial and the challenged statute is not 'readily subject to a narrowing construction by the state courts.'" Id. at 457 (emphasis added).

In this case, the threat to free speech posed by Utah's intoxication statute is neither real nor substantial. Petitioner was convicted of intoxication because he was impaired by alcohol to an extent that his conduct, both verbal and physical, may have posed a threat to himself or others. Whitear has made no showing that his drunken shouts of "Don't shoot" are entitled to Constitutional protection, or that his arrest was the result of any attempt, whether intentional or unintentional, to prevent Whitear from expressing constitutionally protected views.

Additionally, assuming that the Court determined that the intoxication statute was overbroad and might be used to interfere with protected speech, the statute is subject to a limiting

construction. Both the trier of fact and appellate courts can look for objective indicators of intoxication, such as the odor of alcohol, poor balance, slurred speech, difficulty in remembering information or in following instructions, poor judgment, and combative or aggressive behavior. These objective signs of intoxication, while not without variation among individuals, give some means of assuring that arrests and convictions for intoxication are based on the legitimate exercise of police powers, and not on attempts to interfere with protected speech.

#### CONCLUSION

Petitioner has failed to show that his arrest for intoxication was in any way a violation of his First Amendment rights. Petitioner was intoxicated to the extent that his actions may have posed a threat to himself or others. His conviction for intoxication was based on substantial, credible evidence and was appropriately upheld by the Court of Appeals. This case does not raise important questions of state or federal law and Whitear's Petition should be denied.

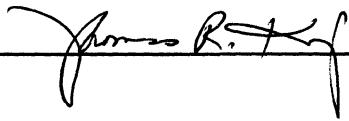
DATED this 14 day of May, 1990.

STATE OF UTAH

  
\_\_\_\_\_  
THOMAS R. KING  
Deputy Morgan County Attorney

CERTIFICATE OF MAILING

Undersigned certifies that four copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed to Brent A. Bohman, Attorney for Petitioner, 1850 Beneficial Life Tower, Salt Lake City, Utah 84111, by depositing the same in the United States mail, postage prepaid, this 24 day of May, 1990.

  
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APPENDIX

Order of Affirmance

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	
	)	
Plaintiff and Appellant,	)	ORDER OF AFFIRMANCE
	)	
v.	)	Case No. 890301-CA
	)	
Haven Whitear,	)	
	)	
Defendant and Respondent.	)	

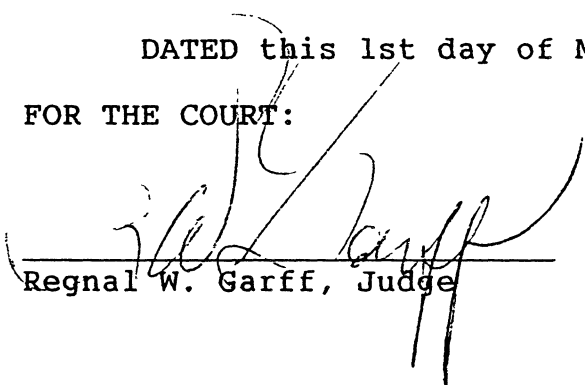
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Before Judges Garff, Billings, and Davidson (on Rule 31 Hearing)

Defendant's conviction of public intoxication is hereby affirmed.

DATED this 1st day of March, 1990.

FOR THE COURT:

  
\_\_\_\_\_  
Regnal W. Garff, Judge